No. 87-2120

In The

Supreme Court of the United States

October Term, 1987

RAYMOND JORDA,

Petitioner,

vs.

CITY OF NEW BRUNSWICK and NEW BRUNSWICK POLICE DEPARTMENT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Superior Court of New Jersey, Appellate Division denied a New Jersey citizen due process by utilizing a more stringent burden of proof than that set forth by this Court to establish a 42 U.S.C. § 1983 claim against a municipality?

2. Whether a municipality's policies and/or customs which are manifest in negligent training, supervision and monitoring of its police officers and which lead to constitutional deprivations can establish municipal liability under 42 U.S.C. § 1983?

THE PARTIES

The parties to the proceedings in the courts below were as follows:

Appellee:

Raymond Jorda (third party plaintiff below)

Appellants:

City of New Brunswick (defendant below)

Officer Dennis McDonough (plaintiff/third party defendant below)

Officer Zane Grey (defendant below)

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No.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

The petitioner, Raymond Jorda, prays that a writ of certiorari be issued to review the final judgment of the Superior Court of New Jersey, Appellate Division, of its decision entered on October 28, 1986 from which the New Jersey Supreme Court entered an order on March 22, 1988 denying his petition for certification.

OPINIONS BELOW

The denial of the petition for certification by the New Jersey Supreme Court is published at 110 N.J. 302, 540 A.2d 1282. The opinion of the Superior Court of New Jersey, Appellate Division is published at 214 N.J. Super. 338, 519 A.2d 874 (App.Div. 1986) and is reproduced as Appendix B, *infra* at 2a.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). Under this statute, this Court is restricted to reviewing state judgment rendered by the highest court of a state in which a decision can be had, but where the highest court of the state denies discretionary review, as the New Jersey Supreme Court did in the instant case, the appeal is properly taken from the judgment of the intermediate appellate court. *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676 (1967).

STATUTORY PROVISIONS INVOLVED

Civil Rights Act of 1871, Section 1, 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case began when police officer Dennis McDonough filed a lawsuit against Raymond Jorda for injuries he received in an altercation. Mr. Jorda answered and filed a counterclaim against Officer McDonough along with a third party complaint against Officer Zane Grey, the New Brunswick Police Department and the City of New Brunswick charging, *inter alia,* that they violated Jorda's federal civil rights.

The jury found that third party plaintiff Raymond Jorda was assaulted and battered by two New Brunswick police officers on July 10, 1981. Both assaults were performed by police officers who claimed to be acting within the scope of their employment. One officer, Dennis McDonough, who was out of uniform and off-duty when he identified himself as a police officer, claimed his warning shots were fired in order to gain control of the situation and his pistol-whipping assault on Jorda was done to subdue him in order to effectuate an arrest. Twenty minutes later, a second officer arrived on the street. The other officer, Zane Grey, who was in uniform and on-duty, attacked the handcuffed Jorda with a nightstick in the back seat of the police car on the way to the police station.

The jury found that the independent acts of these two officers violated Jorda's civil rights. Additionally, the jury found Officer McDonough had no cause of action against Raymond Jorda.

The Appellate Division upheld the verdict of assault and battery but *sua sponte* vacated the jury finding of a civil rights violation based on an improper jury charge. Further, the Appellate Division affirmed the trial court's directed verdict in favor of the City of New Brunswick. The Appellate Division of the Superior Court of New Jersey noted that a municipality may be liable under 42 U.S.C. § 1983 for injury inflicted by its employees when the

injury occurs in the course of the execution of a municipality's policy or custom, but stated that "direct culpability of state officials under section 1983 cannot be established under the substantive or procedural aspects of the Fourteenth's Due Process Clause when the triggering act is simple negligence or lack of due care." The Appellate Division cited two then recent cases, *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) and *Davidson v. Cannon*, 474 U.S. 344, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986). The Appellate Division concluded that "an assertion of negligence existing through policies and customs on the part of municipal officials which may have led to an injury being inflicted by a municipal employee, even though inflicted intentionally by a municipal employee, does not establish a cognizable cause of action against the municipality under section 1983."

Based on their ruling, the appellate court declined to review Jorda's contentions of judicial error in precluding discovery on the policy and customs of the police department and in precluding admissibility of police department regulations for substantive purposes.

Raymond Jorda asserted that three municipal policies and/or customs had motivated the civil rights violations of the two officers. The three policies were:

> 1. The City failed to monitor personal profile histories of prior misconduct evidencing an indifference to reckless behavior.
>
> 2. The City, although having a rule prohibiting warning shots, failed to educate its officers to the permissible discharge of weapons.
>
> 3. The City required off-duty police officers to wear guns even when drinking in bars.

During the discovery period, Mr. Jorda filed a demand for production of certain records pertaining to complaints against the two officers from the New Brunswick Police Department (18a). The business administrator of the City of New Brunswick answered with an affidavit in which he stated:

> I have reviewed their personnel files and have found same not to exist, as I do not maintain copies of any complaint to which no personal action was necessary. Also, I am not aware of any city department which would maintain such records, unless the officers were adjudicated guilty in a Court of Law or in a personnel type hearing.

(23a).

An assistant city attorney from the City of New Brunswick filed a certification in which he stated:

> It is my understanding that neither the Police Department nor the City of New Brunswick maintains information relating to such complaints, unless the officer is adjudicated guilty, as the files might become burdensome to maintain. As such, the information requested does not exist to the best of my knowledge.

(21a).

The petitioner's demand for production of the records was denied (25a) In deposition, Officer McDonough acknowledged there had been more than a dozen prior complaints filed against him.

On the first day of the trial, counsel for Mr. Jorda attempted

to introduce into evidence some prior complaints as well as the fact that no record of such complaints against any officers was kept by the city or by the police department. The trial judge ruled that such evidence was inadmissible because there were no convictions against either of the officers based on any complaints filed against them.

During the course of the trial, the court refused to permit the plaintiff to substantively introduce the municipal rules regarding warning shots. The court further refused to permit plaintiff to question any officers other than McDonough regarding their knowledge and training of the weapon discharge rules.

At the end of petitioner's case, the City of New Brunswick moved for a dismissal. The trial court granted the motion. In doing so, the trial judge stated that the municipality was not liable because there was no history that either of the officers had been previously involved in this type of misconduct nor was there any evidence that the police department or the municipality knew about any such instances and approved them.

After the Appellate Division declined to review the asserted trial errors, the Supreme Court of New Jersey denied Mr. Jorda's petition for certification.

REASONS FOR GRANTING THE WRIT

I.

THE NEW JERSEY COURT OF APPEALS ERRED IN EQUATING MUNICIPAL LIABILITY WITH A PUBLIC OFFICIAL'S INDIVIDUAL LIABILITY UNDER 42 U.S.C. § 1983.

The New Jersey court utilized the wrong standard in denying municipal liability under 42 U.S.C. § 1983 where negligent municipal customs and/or policies of inadequate training, educating, supervising and monitoring police officers promoted a violation of Jorda's constitutional rights to personal security. Also, the New Jersey court failed to consider the direct culpability of a municipality when its rules of conduct motivate constitutional deprivations. *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). By relying on the principles set down by this Court's decision in *Daniels v. Williams,* 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) and *Davidson v. Cannon,* 474 U.S. 344, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986), the New Jersey court failed to appreciate the difference between suits against individual officials and those against officials acting within their public capacity.

In *Daniels v. Williams,* this Court noted that "the due process clause of the 14th Amendment, has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty or property . . . [but] . . . where a government official's act causing injury to life, liberty or property is merely negligent, no procedure for compensation is constitutionally required." 88 L. Ed. 2d at 668 and 669. In *Davidson v. Cannon,* this Court again held that "the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due

care by prison officials." 88 L. Ed. 2d at 683. Neither *Daniels* nor *Davidson* involved the existence of a government policy or custom. Both cases were actions by prison inmates against individual prison officials for individual negligence. In *Daniels,* the inmate slipped on a pillow negligently left on the stairway by a corrections officer. In *Davidson,* the correction official "simply forgot" about an inmate's note advising him of a threat against the inmate. This is not the type of negligence asserted in the instant matter.

Under *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), a municipality can be liable under 42 U.S.C. § 1983 if there has been a deprivation of a constitutional right pursuant to an existing policy or custom of the municipality. In the instant case, Jorda claimed the City of New Brunswick had a custom of not monitoring the citizens' complaints of excessive force filed against its police officers, and of not properly training its officers in the use of weapons.

This Court has expressed no direct opinion as to whether these types of gross negligence could establish a "policy" which motivates subsequent unconstitutional behavior. *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985). However, this Court did hold that a single isolated incident would be insufficient evidence to establish a policy of inadequate training and supervision. *City of Oklahoma City v. Tuttle, id.*

Federal courts of appeal, contrary to the Superior Court of New Jersey, Appellate Division, have held that "a policy or custom may be inferred from acts or omissions of a municipality's supervisory official serious enough to amount to gross negligence or deliberate indifference to the constitutional rights of plaintiff." *Villante v. Dept. of Corrections,* 786 F.2d 516, 519 (2d Cir. 1986) *citing Turpin v. Mailet,* 619 F.2d 196, 201-202 (2d Cir),

cert. denied, 449 U.S. 1016, 101 S. Ct. 577, 66 L. Ed. 2d 475 (1980). Likewise, in *Jones v. City of Chicago,* 787 F.2d 200, 204 (7th Cir. 1986), the court accepted the principle that negligent training and supervision could result in municipal liability.

It is clear, however, that in these cases where plaintiff lacks direct evidence of a policymaker's involvement and must depend upon inference, more than a single incident is required. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986). In *Fundiller v. City of Cooper City,* the court stated that "a custom of allowing excessive force binds a municipality where plaintiff can prove a persistent failure to take disciplinary action against officers giving rise to the inference that a municipality has ratified the conduct, thereby establishing a custom within the meaning of *Monell.*" *Fundiller v. City of Cooper City,* 777 F.2d 1436, 1443 (11th Cir. 1985).

Other circuit courts have recognized that negligent supervision and training, revealed through a consistent pattern of indifference, can sustain a cause of action under § 1983. *See Landrigan v. City of Warwick,* 628 F.2d 736 (1st Cir. 1980); *Wellington v. Daniels,* 717 F.2d 932 (4th Cir. 1983); *Languirand v. Hayden,* 717 F.2d 220 (5th Cir. 1983), *cert. denied,* 104 S. Ct. 2656 (1984); *Rymer v. Davis,* 754 F.2d 198, 201 (6th Cir 1985); *Cowdrey v. City of Eastborough, Kan.,* 730 F.2d 1376, 1379 (10th Cir. 1984). Consequently, where it is shown that municipal policymakers fail to act or fail to make policy, and that inaction leads to the deprivation of a constitutional right, the municipality can be held liable. In such cases, the inaction leads to an inference that the responsible authorities have encouraged or tacitly approved such conduct, or at least that they knew or should have known of such conduct and were deliberately indifferent to it. This inference arises not from the conduct of either high-level policymakers or low-level employees, but from the suspicion that the conduct of low-level employees reflects municipal policy or custom established

or permitted by high-level authorities. Thus, repetition of instances of excessive force will support municipal liability when the injury does not stem directly from a formal policy or from the acts of a policymaker. *Williams v. City of Chicago,* 658 F. Supp. 147 (N.D. Ill. 1987).

The triggering act for the liability of a municipality under 42 U.S.C. § 1983 in such cases is not the simple negligence or lack of due care on the part of an individual municipal policymaker, but rather the municipality's promulgation of an unconstitutional policy or explicit or inferred customs which have caused an injury to the plaintiff. Here, the Appellate Division used the wrong standard in holding that mere negligence on the part of municipal officials does not establish a cognizable cause of action against a municipality under 42 U.S.C. § 1983.

Plaintiff attempted to show that the City of New Brunswick was negligent not only in supervising and training, but was also directly liable under 42 U.S.C. § 1983 for its constitutionally infirm rule which mandated off-duty police officers to wear guns even if they were drinking in bars. The Appellate Division failed to consider this evidence separately from negligent supervision in support of municipal liability. Where a due process deprivation is reasonably foreseeable in the execution of a municipal rule, municipal liability can be imposed. *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

II.

AS A RESULT OF UTILIZING THE WRONG STANDARD, THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION'S CONCLUSION THAT MUNICIPAL LIABILITY CAN NEVER BE ESTABLISHED UNDER 42 U.S.C. § 1983 WHERE A POLICY OF NEGLIGENT SUPERVISION AND TRAINING PROMOTES CONSTITUTIONAL DEPRIVATIONS CONFLICTED WITH OPINIONS OF FEDERAL COURTS OF APPEALS.

It is clear that under *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), a municipality can be a "person" under 42 U.S.C. § 1983, but can only be held liable if the deprivation of a constitutional right was the result of a "policy or custom" of the municipality. This Court held that a municipality can be sued for damages under § 1983 when "the action alleged to be unconstitutional implements a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers" or is "visited pursuant to governmental 'custom' even though such custom has not received formal approval through the body's official decision-making channels." 436 U.S. at 690-691.

(a)

Counsel for petitioner was denied the right to prove policy and customs when it was precluded from introducing evidence of prior complaints alleging the officers' use of excessive force. Counsel was further denied the right to introduce evidence of the municipality's failure to monitor these complaints. The trial court refused to allow such evidence, ruling that it was inadmissible because there were no convictions against either of the officers involved in the trial.

In *Brandon v. Holt*, 469 U.S. 464 (1985), the petitioners brought an action under 42 U.S.C. § 1983 alleging that a Memphis police officer viciously assaulted them. The district court found that the Memphis Police Director should have known about the police officer's dangerous propensities but did not because of policies in effect during that period. This Court noted that the policies of the Memphis Police Department had been found by the district court to include "the inherently deficient nature of police administrative procedures involving the discovery of officer misconduct." 469 U.S. at 466. This case established that a municipality can be held liable under 42 U.S.C. § 1983 in an action against a public servant in his official capacity, and further stated that the "obviously inadequate" procedures of the Memphis Police Department may evince policies and customs sufficient to establish liability under § 1983.

In the *Brandon* case, there were complaints in the files that could be perused. But, in the instant case, a failure in record keeping is evidenced by the affidavit of the business administrator of the City of New Brunswick and by the certification of the assistant city attorney for the City of New Brunswick which state that no complaints are kept unless they result in action against the officer or unless the officer is adjudicated guilty in a court of law or in a personnel hearing. At deposition, Officer Grey testified that more than a dozen complaints had been filed against him and that none of these had resulted in city action.

The lack of a procedure for discovering police misconduct has been consistently held to be a policy or custom actionable under § 1983 in the lower federal courts. In *Fiacco v. City of Rensselaer, New York*, 783 F.2d 319 (2d Cir. 1986), the plaintiff alleged that the city failed to exercise reasonable care in investigating claims of police brutality, thereby exhibiting a knowing and deliberate indifference to the possibility that its police officers were wont to use excessive force. The court held that

this was sufficient under § 1983 to establish a "policy" under which the plaintiff was injured, stating:.

> A municipality that has the responsibility to keep order and to protect the rights of those within its boundaries to be free from physical violence gives its policemen considerable power to subdue persons who would violate those rights. It cannot responsibly condone police officers' use of that power in a way that is itself lawless. It should not take a laissez-faire attitude toward the violation by its peace officers of the very rights they are supposed to prevent others from violating. A principle that would give a municipality immunity from section 1983 liability for injury caused by its deliberate indifference to its police officers' use of excessive force in violation of constitutional principles would foster the denial — both by policemen and by civilians — of the very rights the city is responsible for safeguarding."

783 F.2d. at 327.

In *Stengel v. City of Hartford,* 652 F. Supp. 572 (D.C. Conn. 1987), the plaintiff brought an action against several police officers and the city. There were allegations that in addition to the instant incident, one of the officers had been the subject of civilian brutality complaints on at least two other occasions but had not received disciplinary action. Plaintiff alleged that these facts established that it was the custom or unwritten policy of the Hartford Police Department to support and approve the use of unprovoked violence against civilians by its police officers. The court stated:

> Claims of previous incidents of police brutality

> along with a city's treatment of such claims may be relevant to the proof of a *Monell* claim. A municipality responsive to its duties relative to the exercise of police power can be expected to investigate claims which on their face have at least a modicum of merit to ascertain, to the extent reasonably possible, the facts of the conduct complained of and to take such action as is warranted by the facts, including disciplinary action against officers shown to have wrongfully exercised the power of their office. Liability exists only where the city's response to complaints was so deficient, either in failing to investigate or in failing to act when the circumstances warranted action, as to suggest that its official attitude was one of indifference to the truth or condonation of the abuse of authority by its officers. Such an attitude would bespeak an indifference to the rights which the complaints would suggest had been violated.

652 F. Supp. at 574.

In the case at bar, evidence of prior complaints against Officers McDonough and Grey, as well as evidence of the lack of an appropriate procedure to monitor complaints of the use of excessive force were relevant to petitioner Jorda's *Monell* claim that the City of New Brunswick had a "policy or custom" of condoning the use of excessive force. The refusal of the trial judge to allow such evidence was in conflict with decisions of this Court and with decisions of lower federal courts.

(b)

Counsel for Jorda also attempted to discover and introduce

evidence that the City of New Brunswick had a custom of not educating its police officers regarding warning shot prohibitions, thereby condoning the use of improper force (30a, 35a). The Standard Operating Procedure states 'that police officers employ force in the performance of their duties only to the degree and in the manner provided by law . . ." The Standard Operating Procedure also states "warning shots by officers performing their duties are not authorized." The evidence at trial showed that three warning shots were fired by two officers. Additionally, McDonough testified that he was unaware of the Standard Operating Procedure requirements and that he in fact believed that the firing of such a warning shot was permissible. Counsel for Jorda was precluded from questioning the other officers concerning their knowledge of the Standard Operating Procedure. Accordingly, the City's issuance of the Standard Operating Procedure amounted to superficial training and guidance.

The Supreme Court has not expressed an opinion on whether inadequate training could meet the policy requirement of *Monell*. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985) f.7. Several lower federal courts have agreed that failure to train adequately may create liability. *See e.g., Beverly v. Morris*, 470 F.2d 1356 (5th Cir 1972); *Popow v. City of Margate*, 476 F. Supp. 1237 (D.C.N.J. 1979).

In *Leite v. City of Providence*, 463 F. Supp. 585 (D.R.I. 1978), the court held "if a municipality completely fails to train its officers in a reckless or grossly negligent manner so that future misconduct is almost inevitable, the municipality exhibits a deliberate indifference to the resulting violations of constitutional rights."

In the present case, plaintiff should have been permitted to prove that the City's failure to educate their police officers

regarding the use of warning shots amounted to a deliberate indifference to the officers use of such force.

(c)

Plaintiff's assertion of negligence in policy requirements is sufficient to warrant the imposition of § 1983 liability upon the City of New Brunswick. The City's mandate that police officers wear their guns at all times, even while off-duty, constituted a broad policy which set forth no guidelines for its execution.[1] This policy was the proximate cause of plaintiff's injuries.

This Court has set forth guidelines which establish when a municipality will be held liable under § 1983. In *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), this Court held that local governing bodies can be sued directly under § 1983 for monetary, declaratory or injunctive relief where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. 436 U.S. at 690, 56 L. Ed. 2d at 635. The Supreme Court set forth two basic requirements for the imposition of municipal liability under § 1983. First, there must be proof of an existing municipal policy or custom. Second, the plaintiff must prove that the policy or custom was the cause, in fact, of the constitutional or statutory deprivation.

In the instant case, although plaintiff satisfied both requirements of the *Monell* test, the trial court failed to recognize the adequacy of the established causal connection. The court erred in refusing to follow the Monell standard.

---

1. McDonough's testimony of City policy was uncontroverted at the time of trial (29a).

Courts in other jurisdictions have properly utilized the *Monell* test when determining the sufficiency of the causal link between the municipality's policy and the injured party's constitutional deprivation. In *Turk v. McCarthy*, 661 F. Supp. 1526 (E.D.N.Y. 1987), plaintiff contended that the defendant city failed to provide regulations concerning the carrying of firearms by off-duty policemen. Plaintiff asserted that the city "allowed" and "condoned" the practice of carrying firearms in situations where officers would be consuming alcoholic beverages and that the city failed to establish a policy that would prevent possession of firearms in such situations.

The *Turk* court found, however, that the city had, in fact, provided guidelines for carrying firearms by police while off-duty. Police officers were expressly instructed not to carry firearms in inappropriate situations and were prohibited from consuming quantities of alcohol that might impair their judgment. 661 F. Supp. at 1533.

The instant case is distinguishable from *Turk*, however, since the City of New Brunswick did not merely condone the carrying of firearms by off-duty police officers. Rather, the City's policy mandated officers to carry weapons at all times and required them to take action when they saw crimes being committed. Unlike the policy set forth by the city in *Turk*, New Brunswick's policy failed to establish appropriate standards of conduct. This inadequate policy provided the moving force which proximately caused the deprivation of plaintiff Jorda's constitutional rights. These violations took place in a bar where officers were drinking. The City should have foreseen the need for express exceptions to its policy which would be applicable to situations in which officers might consume alcohol while off-duty.

Foreseeablity of harm is created where broad policy rules exist without restriction. In *Fiacco v. City of Rensselaer, New*

York, 783 F.2d 319 (2nd Cir. 1986), plaintiff brought action against the city for deprivation of her constitutional rights which occurred during and following her arrest. On appeal, defendant contended that there was a logical flaw in plaintiff's allegation that the city deliberately acted indifferently to the possibility that its police officers might use excessive force. The court, however, upheld plaintiff's reasoning that deliberate indifference could be inferred and would serve as a basis of liability for the deprivation of constitutional rights. *Fiacco,* 783 F.2d at 326.

The case at bar is analogous to *Fiacco*. The City of New Brunswick demonstrated its indifference to the foreseeability that its police officers who had been drinking in bars would use excessive force when complying with the City's mandate to be armed at all times and to act when crimes are being committed. According to the reasoning in *Fiacco,* New Brunswick should be held liable for its policy. The policy was so broad that by inference it promoted the use of excessive force which resulted in constitutional violations.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the Superior Court of New Jersey, Appellate Division, should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF SUPREME COURT OF NEW JERSEY DENYING CERTIFICATION

SUPREME COURT OF NEW JERSEY
C-670 September Term, 1987
26,397

DENNIS MC DONOUGH,

Plaintiff-Cross-Petitioner,

vs.

RAYMOND JORDA,

Defendant-Cross-Respondent.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court,

A petition for certification of the judgment of A-1595-84/454-85T5 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 21st day of March, 1988.

s/ Stephen W. Townsend
CLERK OF SUPREME COURT

Filed: March 22, 1988

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

DENNIS MCDONOUGH, PLAINTIFF-RESPONDENT, CROSS-APPELLANT, v. RAYMOND JORDA, DEFENDANT-THIRD PARTY PLAINTIFF-APPELLANT.

and

MIKE KNIGHT, DEFENDANT-THIRD PARTY PLAINTIFF, v. ZANE GREY, NEW BRUNSWICK POLICE DEPARTMENT, CITY OF NEW BRUNSWICK AND RONALD GATYAS AND ROHOGA, INC. T/A ALE-N-WICH, THIRD PARTY DEFENDANTS-RESPONDENTS.

Superior Court of New Jersey
Appellate Division

Argued September 10, 1986—Decided October 28, 1986.

Before Judges KING, DEIGHAN and MUIR, Jr.

Jane B. Cantor argued the cause on behalf of appellant Jorda (*Garruto, Galex & Cantor,* attorneys; *Bryan D. Garruto*, of counsel; *Jane B. Cantor* and *Carol Gerity* on the brief; *Jane B. Cantor* on the reply brief).

John F. Lisowski argued the cause on behalf of cross-appellant McDonough (*Morgan, Melhuish, Monaghan, Arvidson, Abrutyn & Lisowski,* attorneys; *John F. Lisowski,* of counsel; *Robert A. Assuncao* on the brief).

Robert J. Reilly, III, argued the cause on behalf of respondent Ale-N-Wich (*Haggerty & Donohue,* attorneys; *Robert J. Reilly* on the brief).

Appendix B

Linda K. Anderson argued the cause on behalf of respondents City of New Brunswick and New Brunswick Police Department (*James M. Cahill,* City Attorney, attorney; *Linda K. Anderson,* of counsel and on the brief).

John Brady argued the cause on behalf of respondents New Brunswick Police Department and City of New Brunswick (*Richard A. Amdur,* attorney).

No appearance for or brief filed on behalf of respondent Grey.

The opinion of the court was delivered by

MUIR, Jr., J.A.D.

After a jury verdict and the trial judge's rulings on motions for new trials on liability and damages, we granted leave to appeal on the correctness of three rulings by the trial judge: (1) the denial of a motion for a new trial on liability; (2) the granting of a motion for a new trial on damages, and (3) the granting of a directed verdict in favor of the City of New Brunswick.

The action had its genesis in a brawl outside a New Brunswick tavern on the night of July 10, 1981. Plaintiff, a New Brunswick police officer, alleging injuries sustained in the brawl, sought compensatory damages from defendants Raymond Jorda and Mike Knight. Jorda, in several amended pleadings, filed counterclaims and third-party complaints. In those pleadings, he sought compensatory and punitive damages from plaintiff and from third-party defendant Zane Grey, and other individuals not directly involved in this appeal. Jorda asserted claims of negligence and intentional malicious conduct on the part of plaintiff and

Grey. He also alleged violation of his civil rights under state and federal law. The third-party complaint named the City of New Brunswick as a defendant. That pleading made no specific allegations of liability against the city. During discovery, trial and this appeal, the theory of city accountability resolved into a claim of negligence in the policies and customs of city officials which placed plaintiff and Grey in a position to conduct their aggressive, wrongful behavior.

Plaintiff and Jorda also asserted claims against the tavern and its bartender for negligent serving of alcoholic beverages. *See Rappaport v. Nichols,* 31 *N.J.* 188 (1959); *Anslinger v. Martinsville Inn, Inc.,* 121 *N.J. Super.* 525 (App. Div. 1972). The jury found no cause for action on those claims. There is no appeal from those verdicts. The tavern and bartender have a tangential involvement in this appeal, however, as to the review of the denial of a new trial on liability.

After a five day trial, the trial judge granted a directed verdict in favor of the city, finding no viable claim under either the New Jersey Tort Claims Act or under the Civil Rights Act, 42 *U.S.C.A.* § 1983 (West 1981). The jury returned a verdict in favor of Jorda against plaintiff and Grey. It found that plaintiff had committed an assault and battery on Jorda and had violated his civil rights. It awarded Jorda $90,000 in compensatory damages, $150,000 in punitive damages and $25,000 in damages for the civil rights violation. It found similar liability against Grey and awarded Jorda $100,000 in compensatory damages, $175,000 in punitive damages and $25,000 in damages for the civil rights violation.

The trial judge concluded the evidence did not support the total $565,000 award and set it aside. He based his determination as to the compensatory damages awarded on the absence of any

permanent injury to Jorda. He found the failure of Jorda to prove the wealth of the wrongdoers as an element of his claim fatal to the punitive damage award. (Neither the court nor trial counsel raised this issue prior to or after the jury instructions.) Coterminus with the vacation of all damage verdicts, the trial judge denied a motion for new trial on liability.

The evening of the brawl, plaintiff and several friends came to the tavern after a softball game. Plaintiff wore a softball uniform. He also carried his service revolver pursuant to City Police Department policy. Jorda, Knight and some other college students met at the tavern for a social evening. None of the participants in the brawl showed any reasonably visible signs of intoxication. Only Jorda testified to an effect from his drinking and that related to his coordination in trying to flee the scene of the brawl.

When Jorda and Knight left the tavern, Jorda took a mug of beer. The bartender followed to retrieve the mug. Plaintiff, with some of his friends followed, ostensibly to assist the bartender. What transpired thereafter is the subject of significant variation.

Jorda and Knight testified that plaintiff and his friends precipitated the brawl. Their version essentially indicated plaintiff went after Jorda, so Knight, a football linebacker, acting to defend Jorda, punched plaintiff and two of his friends, knocking them to the ground. Plaintiff then pulled out his service revolver and badge. He identified himself as a police officer and fired at least one shot into the ground. Jorda's friends fled when the plaintiff fired his revolver. Jorda tried to flee, but plaintiff hit him and Jorda fell to the ground. While he was on the ground, several persons whom Jorda could not identify, kicked him.

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Plaintiff's version of the incident identified Jorda and Knight as the aggressors. He claimed Jorda became aggressive when asked to return the beer mug and that Knight initiated the fight. He testified that upon being knocked down by Knight's punch, he stood up, identified himself as a police officer and fired a shot to "get control of the situation." He denied any knowledge of a police regulation prohibiting the firing of warning shots.

Other police officers, including Grey, came to the scene. They handcuffed Jorda and put him in the back seat of a patrol car. Jorda testified they then drove him around while Grey systematically beat him with a nightstick. Photographs were offered into evidence to show Jorda's physical condition after the brawl. Grey denied having the nightstick and denied hitting Jorda.

The emergency room report on Jorda's admission indicated he had two lacerations on the back of his head, which required stitches, and contusions of the nose and lower lip. Jorda testified that he also sustained a lump on his head the size of a grapefruit and soreness all over his body, and that he went to the doctor eight to ten times for a knotted muscle. No medical expert testified on the extent of Jorda's injuries.

The judge, in his charge to the jury, stated the jury could award Jorda damages for pain and suffering but not for any permanent injury. That charge drew no objection from Jorda's counsel.

I.

Plaintiff contends the trial judge erred in denying his motion for a new trial on liability. He argues the exorbitant amount of

the damage award is evidence that the verdict was the product of passion and prejudice of the jury which also tainted the liability verdict. He further contends that inconsistencies in the testimony of Jorda's witnesses mandate the need for a new trial.

A trial court's ruling on a motion to set aside a jury verdict as against the weight of the evidence will not be reversed on appeal unless it clearly appears that there was a miscarriage of justice. *R.* 2:10-1. In making our assessment, we apply the same standard and must defer to the trial judge's evaluation of witness credibility and demeanor and his or her "feel of the case." *Dolson v. Anastasia,* 55 *N.J.* 2, 6 (1969).

The trial judge, while shocked at the magnitude of the damage award, found no basis for granting a new trial on liability. Relying on the recited criteria, we agree. However, we vacate the verdict on civil rights liability against plaintiff due to the insufficiency of the trial court's instructions to the jury.

We find no miscarriage of justice in the verdict finding plaintiff liable for assault and battery. That verdict rested essentially on the credibility of the witnesses. The witnesses gave disparate versions of what transpired. The trial judge's sense for the credibility and demeanor of the witnesses, which the jury evaluated, justified denying an application to vacate the liability determination. We conclude there is nothing in the record to warrant changing that determination.

As to the verdict on civil rights liability, we conclude the insufficiency of the trial judge's charge constituted plain error requiring a new trial on liability for plaintiff.

The entire § 1983 jury instruction, both substantive and

damage aspects, came during the trial judge's explanation on the law of damages. His charge provided:

> Now, in addition to the punitive damages, there is another element of damage which Mr. Jorda claims and that is damages for violation of his civil rights. This is under our Federal statute, 42 Section 1983 and I'll just read it to you in its pertinent part. 'Each person who under color of any statute, ordinance, regulation, custom, or usage of any state or territory of or the District of Columbia, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the Constitution and laws, shall be liable to the party injured in an action of lawsuit and equity or other proper proceedings for redress.'
>
> It is the contention of Mr. Jorda that by the commission of this assault and battery by both Officers McDonough and Grey, who were then exercising their duties as police officers, that they violated his Constitutional right of life, liberty, or property without due process of law under the 14th Amendment of the Constitution.
>
> Now, as to punitive damages and to violation of damages for alleged violation of civil rights again you must exercise your good, sound judgment as to what is just and fair in that regard to accomplish the purposes of those elements of damage.

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Jury instructions must correctly state the applicable law in understandable language and plainly spell out how the jury should apply the facts as it may find them. *Jurman v. Samuel Braen, Inc.*, 47 *N.J.* 586, 591-92 (1966). Whether counsel avail themselves of the opportunity to request instructions under *R.* 1:8-7, the trial judge must prepare a full, complete charge on all facets of the applicable law.

The applicable law in this instance required an instruction regarding the essential elements of a § 1983 cause of action, with careful explanation of the scope of those elements as well as related legal concepts, including any possible defenses. While the judge did provide general instructions on the applicable law, he did not do so in a manner and scope sufficient to guide the jury in its responsibility to reach its ultimate conclusions.

The judge should have instructed that Jorda had the burden of proving, by a preponderance of the evidence: (1) that the conduct complained of was committed by a person acting under color of State law, and (2) that the conduct deprived the claimant of rights, privileges and immunities secured by the Constitution of the United States, identifying the applicable rights.[1] *See Parratt v. Taylor*, 451 *U.S.* 527, 535, 101 *S.Ct.* 1908, 1912, 68 *L.Ed.*2d 420, 428 (1981).

The trial court's charge described Jorda's contention. However, the charge did not define the nature of an action under color of state law or the nature of the deprived right. Further, it did not delineate how the jurors should apply that law to the

---

1. Although not raised in issue here, proximate cause of the injuries and consequent damages allegedly sustained may also have to be charged. *See Martinez v. California*, 444 *U.S.* 277, 100 *S. Ct.* 553, 62 *L. Ed.* 2d 481 (1980).

facts as they found them.

Additionally, by locating all the elements of the § 1983 liability and damage claim in the damage portion of the entire jury charge, the jury may have been misled to believe that it had to decide only the issue of damages. The verdict interrogatories compounded that possibility by omitting any provision for liability under § 1983.

Finally, the absence of any reference to Jorda's burden of proof exacerbated the possible misleading of the jury. Collectively, these inadequacies mandate a reversal and new trial on all § 1983 issues.

We do not suggest by the foregoing to outline the entire charge. We commend the trial court's attention to model charges on § 1983.[2]

II.

Jorda contends the trial judge erred in ordering a new trial on damages. We disagree.

We have previously set forth the standard for reviewing a motion for a new trial by the trial and appellate courts. When that standard is considered in relation to a motion for a new trial on damages, our Supreme Court has directed that:

> A trial judge should not interfere with the

2. While we make no judicial evaluation of the correctness of model charges on § 1983 claims, we suggest as an aid to preparation of a charge that the trial judge review 4 Modern Federal Jury Instructions (Matthew Bender) Ch. 87 (1985).

> quantum of damages assessed by a jury unless it is so disproportionate to the injuries and resulting disabilities shown as to shock his conscience and to convince him that to sustain the award would be manifestly unjust. In making its overview, a court must accept the medical evidence in the most favorable light to the plaintiffs; it must accept the conclusion that the jury believed the plaintiff's injury claims and the testimony of their supporting witnesses, and if, tested on such bases, the verdict (even if generous) has reasonable support in the record, the jury's evaluation should be regarded as final. [*Taweel v. Starn's Shoprite Market, 58 N.J.* 227, 236 (1971)].

The only feature distinguishing appellate review from that of the trial court is that we must give deference to the trial judge's "feel of the case." *Baxter v. Fairmont Food Co.*, 74 *N.J.* 588, 600 (1977). Further, there is little or no difference in our role whether the damages being reviewed are compensatory or punitive. *See Leimgruber v. Claridge Associates, Ltd.*, 73 *N.J.* 450, 456-457 (1977).

The jury awarded Jorda a total of $565,000 against both plaintiff and Grey. This shocked the conscience of the trial judge. For the $190,000 compensatory damage award, Jorda proved no permanent injuries. Nor did he provide medical testimony on the scope and nature of his injuries. He sustained two cuts to the back of the head requiring stitches. He further sustained a contusion to the nose and lower lip, a lump on his head and a knotted muscle. He also stated he now had an emotional fear of police officers.

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We conclude the compensatory award was so disproportionate to the extent of the injuries sustained as to constitute a manifest injustice. The evidence does not support an award of that magnitude, even giving due regard to a concept of generousness.

The $225,000 punitive damage award must be set aside for failure of proof on the issue of the wealth of plaintiff and Grey. In assessing exemplary damages, a jury must take into consideration the wealth of the defendants. *Leimgruber v. Claridge Associates,* 73 *N.J.* at 456. This is so because the theory behind punitive damages is to punish for the past event and to prevent future offenses, and the degree of punishment resulting from a judgment must be, to some extent, in proportion to the means of the guilty person. *Restatement (Second) of Torts,* § 908 comment d (1977).

Jorda offered no evidence on the ability of the wrongdoers to pay any award. That lack of evidence, an essential of Jorda's burden of proof, precluded the jury from having a proper foundation to assess damages. Moreover, in the absence of a ruling or instruction by the court, the jury had no idea of the appropriate law.

Finally, as to the damages for the purported civil rights violations committed by plaintiff and Grey, while set aside with the liability verdict on that issue, we note the jury interrogatories made no provision for compensatory and punitive damages. On retrial, with both types of damages charged as before, the interrogatories should be appropriately corrected.

III.

Jorda avers the trial judge erred in directing a verdict in favor

of the City. (For the purposes of our decision, the Police Department and City of New Brunswick are synonymous.)

Jorda's theory of liability rested on a claim of negligence existing through policies and customs established or permitted to exist in the police department. He asserted that negligence was reflected by (1) lack of training of the subject officers, since plaintiff testified he did not know of the police department regulations against firing warning shots; (2) requiring police officers to carry weapons 24 hours a day, even in bars, and (3) failure of the department to keep proper records on police misconduct, thus allowing police officers the latitude which led to the tortious conduct by plaintiff and Grey. He proffered liability for such negligence existed under the New Jersey Tort Claims Act, specifically *N.J.S.A.* 59:2-2, and under § 1983.

We conclude there is no municipal liability for the alleged negligent conduct under either the New Jersey Tort Claims Act or § 1983.

N.J.S.A. 59:2-10 provides:

> A public entity is not liable for the acts or omissions of a public employee constituting a crime, actual fraud, actual malice *or willful misconduct.* [Emphasis supplied].

This language is clear and unambiguous. As such, the language is not open to construction or interpretation and to do so in a case where not required, is to do violence to the doctrine of the separation of powers. *Watt v. Mayor and Council of Borough of Franklin,* 21 *N.J.* 274, 277 (1956). That municipal immunity existed here is open to no cavil when one reads *N.J.S.A.*

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59:2-1 and the comment which follows it from the *Report of the Attorney General's Task Force on Sovereign Immunity* (1972).

N.J.S.A. 59:2-1 provides, in the part pertinent here:

> b. Any liability of a public entity established by this act is subject to *any* immunity of the public entity . . . [Emphasis supplied].

The comment to this section, after noting the economic enigmas created for municipalities by costly litigation, possible judgments and insurance costs, stated:

> . . . the analytical approach of the courts should be *whether an immunity applies and if not, should liability attach.* It is hoped that in utilizing this approach the courts will exercise restraint in the acceptance of novel causes of action against public entities. [Emphasis in original]
>
> *Subsection (b) is intended to insure that any immunity provisions provided in the act . . . will prevail over liability provisions.* [Emphasis supplied].

The language of the statute is clear. When the municipal employees committed the intentional torts, *respondeat superior* did not apply. The City was not vicariously liable in such cicumstances. We cannot, by judicial prestidigitation, create municipal liability where municipal immunity is legislatively prescribed.

Jorda's § 1983 liability claims rested on the alleged negligent

policies and customs of city officials previously noted.

Since *Monell v. New York City Dept. of Soc. Serv.*, 436 *U.S.* 658, 695, 98 *S.Ct.* 2018, 2038, 56 *L.Ed.*2d 611, 638 (1978), a municipality may be liable under § 1983 for injury inflicted by its employees when the injury occurs in the course of the execution of a municipality's policy or custom. With that development, described as producing a somewhat sketchy state by Justice, now Chief Justice, Rehnquist in *Oklahoma City v. Tuttle,* 471 *U.S.* 808, 818, 105 *S.Ct.* 2427, 2434, 85 *L.Ed.*2d 791, 802 (1985), refinement of the scope of municipal liability has followed. *See id., Pembaur v. City of Cincinnati,* 475 *U.S.* ____, 106 *S.Ct.* 1292, 89 *L.Ed.*2d 452 (1986).

However, a pivotal element of any such liability remains the deprivation of a protected right. The apparent protected rights argued here are a liberty interest in personal security and freedom from excessive force in an arrest. The argument promulgated suggests a denial of Fourth (as implemented against the States through the Fourteenth) and Fourteenth amendment rights. But direct culpability of state officials under § 1983 cannot be established under the substantive or procedural aspects of the Fourteenth's Due Process Clause when the triggering act is simple negligence or lack of due care. *Daniels v. Williams,* 474 *U.S.* ____, ____, 106 *S.Ct.* 662, 663, 88 *L.Ed.*2d 662, 666 (1986); *Davidson v. Cannon,* 474 *U.S.* ____, ____, 106 *S.Ct.* 668, 670, 88 *L.Ed.*2d 677, 683 (1986). In both of these decisions, the negligence of state officials was the underlying premise for claims of § 1983 liability. In *Daniels,* the Supreme Court held that where a government official is merely negligent in causing the injury,"no procedure for compensation is constitutionally required." *Daniels,* 474 *U.S.* at ____, 106 *S.Ct.* at 666, 88 *L.Ed.*2d at 669. In *Davidson,* the Court held that lack of due care on the part of a public official which

led to the serious injury simply "[did] not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent." *Davidson,* 474 *U.S.* at ____, 106 *S.Ct.* at 671, 88 *L.Ed.*2d at 682. *Cf. Anastasio v. Planning Bd. of Tp. of West Orange,* 209 *N.J.Super.* 499 (App.Div.1986).

Consequently, we conclude, an assertion of negligence existing through policies and customs on the part of municipal officials which may have led to an injury being inflicted by a municipal employee, even though inflicted intentionally by that employee, does not establish a cognizable cause of action against the municipality under § 1983.

Based on our ruling, we need not deal with Jorda's contentions of judicial error in precluding discovery on the customs of the police department and precluding trial admissibility of police department regulations for substantive purposes.

IV.

In conclusion, we affirm the directed verdict in favor of the City of New Brunswick. We further affirm the order for a new trial on damages. Finally, we affirm the denial of a new trial on liability except as to the § 1983 liability verdicts which we reverse and remand for trial.

APPENDIX C — PAPERS TO THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MIDDLESEX COUNTY

GARRUTO, GALEX AND CANTOR
39 Milltown Road
East Brunswick, New Jersey 08816
(201) 390-0200
Attorneys for Defendant-Third Party
Plaintiff, Jorda

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

Docket No. L-71637-80

Plaintiff

DENNIS McDONOUGH,

vs.

Defendant -Third Party Plaintiff

RAYMOND JORDA,

vs.

Third Party Defendants

ZANE GREY, et als,

CIVIL ACTION

Appendix C

NOTICE OF MOTION

TO: RICHARD A. AMDUR, ESQ.
P.O. BOX 190
Oakhurst, NJ 07755

SIR:

PLEASE TAKE NOTICE that on Friday, June 29, 1984, at 9:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, the undersigned, attorneys for the defendant-third party plaintiff, Raymond Jorda, shall apply to the above named Court for an Order compelling the defendant, New Brunswick Police Department, to produce any and all complaints filed against Officers Zane Grey and Dennis McDonough in which the allegations were the use of excessive force, or, in the alternative, to dismiss the answer and all affirmative defenses of said defendant for failure to produce such documents.

IN SUPPORT of our application, we shall rely upon the certification of counsel annexed hereto and made a part hereof.

Pursuant to Rule 1:6-2, the undersigned requests that this matter be submitted to the Court for a ruling on the papers. A proposed form of Order is annexed.

GARRUTO, GALEX & CANTOR

By: Bryan D. Garruto
BRYAN D. GARRUTO

Dated: June 11, 1984

Appendix C

CERTIFICATION

BRYAN D. GARRUTO does hereby certify that:

1. I am an attorney at law of the State of New Jersey and am charged with the handling of the within action.

2. A Demand for Production of Documents was served upon counsel for the defendant, New Brunswick Police Department, for the personnel records of Zane Grey and Dennis McDonough, specifically asking for copies of any and all complaints filed against said officers in which the allegations were for excessive force.

3. The records as received failed to reveal any such incident reports. We are aware that such incident reports exist as during depositions the defendant officers admitted that such complaints had been filed against them.

4. We respectfully request that the defendant be compelled to produce such documents or, alternatively, that their answer and all affirmative defenses be dismissed for failure to do so.

5. I hereby certify that the foregoing statements made by me are true. I am aware that if any are willfully false, I am subject to punishment.

s/ Bryan D. Garruto
BRYAN D. GARRUTO

DATED: June 11, 1984

Appendix C

RALPH F. STANZIONE, ESQ.
Assistant City Attorney
78 Bayard Street
New Brunswick, New Jersey 08903
(201) 745-5025

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

DOCKET NO. L-71637-80

DENNIS McDONOUGH,

Plaintiff,

vs.

RAYMOND JORDA,

Third Party Plaintiff,

vs.

ZANE GREY, et als.,

Third Party Defendants.

CIVIL ACTION

CERTIFICATION

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Ralph F. Stanzione, Esq. does hereby certify that:

I. I am an Assistant City Attorney of the City of New Brunswick and in that capacity I am responsible for the handling of this matter.

2. A Demand for Production of Documents as stated in the moving papers was received by this office.

3. This office provided copies of the personnel files as requested, even though they did not contain any information relating to any complaints alleging the use of excessive force. It is my understanding that neither the Police Department nor the City of New Brunswick maintains information relating to such complaints unless the officer is adjudicated guilty, as the files might become burdensome to maintain. As such the information requested does not exist to the best of my knowledge.

4. As to any indication in depositions that such complaints do exist, it would appear to me that the deponent was testifying as to his knowledge and not towards the existence of any records. Furthermore, I would suggest that the deponent be further deposed since the City does not possess any such information.

5. I respectfully request that the defendants/third party plaintiff Motion be dismissed.

s/ Ralph F. Stanzione
RALPH F. STANZIONE, ESQ.

DATED: June 19, 1984

Appendix C

RALPH F. STANZIONE, ESQ.
Assistant City Attorney
78 Bayard Street
New Brunswick, New Jersey 08903
(201) 745-5025
Attorney for Defendant
City of New Brunswick

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

DOCKET NO. L-71637-80

DENNIS McDONOUGH,

Plaintiff,

vs.

RAYMOND JORDA,

Third Party Plaintiff,

vs.

ZANE GREY, et als.,

Third Party Defendants.

CIVIL ACTION

AFFIDAVIT IN OPPOSITION TO NOTICE OF MOTION TO DISMISS ANSWER

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STATE OF NEW JERSEY:
ss.:
COUNTY OF MIDDLESEX:

Stanley R. Marcinczyk, being duly sworn upon his oath, deposes and says:

1. I am employed as the Business Administrator of the City of New Brunswick, as defendant in this matter, and I have served in said capacity since January 1979.

2. In that capacity, it is my staffs responsibility to maintain personnel records of all City employees, including the members of the Police Department.

3. I understand that the party bringing this Motion before this Court has requested copies of all complaints that have been filed against officers Dennis McDonough and Zane Grey. I have reviewed their personnel files and have found same not to exist, as I do not maintain copies of any complaints to which no personal action was necessary. Also, I am not aware of any City department which would maintain such records, unless the officers were adjudicated guilty in a Court of Law or in a personnel type hearing.

4. If the Court were to order myself or the City to produce said information, I do not know how it could produce something that does not exist.

s/ Stanley R. Marcinczyk
STANLEY R. MARCINCZYK

(Sworn to June 21, 1984)

Appendix C

GARRUTO, GALEX AND CANTOR
39 Milltown Road
East Brunswick, New Jersey 08816
(201) 390-0200
Attorneys for Defendant-Third Party
Plaintiff, Jorda

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

Docket No. L-71637-80

Plaintiff

DENNIS McDONOUGH,

vs.

Defendant -Third Party Plaintiff

RAYMOND JORDA,

vs.

Third Party Defendants

ZANE GREY, et als

CIVIL ACTION

ORDER (DENIAL OF ORDER TO PRODUCE)

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THIS MATTER having been brought before the Court by Bryan D. Garruto, Esq., attorney for defendant-third party plaintiff, Raymond Jorda, and the Court having considered the matter and the papers submitted,

IT IS on this __ day of June 1984, ORDERED that the defendant New Brunswick Police Department produce for inspection by defendant-third party plaintiff Raymond Jorda, within __ days of the date hereof, any and all complaints filed against Officers Zane Grey and Dennis McDonough in which the allegation has been the use of excessive force; and

IT IS further ORDERED that should said defendant fail to comply with the above provision, their answer and all affirmative defenses shall be dismissed upon the filing of an ex parte order and affidavit; and

IT IS further ORDERED that a copy of this Order be served upon all counsel within ____ days of the date hereof.

_____

J.S.C.

DENIED

Appendix C

RICHARD A. AMDUR
A Professional Corporation
State Highway 35
1 Industrial Way West
Eatontown, New Jersey 07724
(201) 389-3800
Attorney for Defendants,
New Brunswick Police Department
and City of New Brunswick

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

Docket No. L-71637-80

Plaintiff

DENNIS McDONOUGH,

vs.

Defendant

RAYMOND JORDA, and MIKE KNIGHT,

vs.

ZANE GREY, CHARLES CLARK, JOHN DOE, ETC., ET AL.

CIVIL ACTION

Appendix C

ORDER OF DISMISSAL AS TO THE CITY OF NEW BRUNSWICK and NEW BRUNSWICK POLICE DEPARTMENT

This matter having been tried before this Court and a jury and the Court having granted on November 29, 1984, the Motion for Dismissal of the Third Party Complaint of Third Party Complaintant, Raymond Jorda, as to the City of New Brunswick and the New Brunswick Police Department for a dismissal of all claims:

It is on this 10th day of December 1984,

ORDERED

that judgment be and hereby is entered in favor of the City of New Brunswick and the New Brunswick Police Department against the defendant, third party complaintant Raymond Jorda.

s/ C. John Stroumtsos
C. JOHN STROUMTSOS, J.S.C.

(Filed December 10, 1984)

APPENDIX D — EXCERPTS OF TRIAL TESTIMONY

TRANSCRIPT DATED NOVEMBER 26, 1984

Dennis McDonough - direct

[Page 14, Line 17 to Page 16, Line 7]

Q. And when you saw the defendant Jorda kicking Officer Guyette in the head, what, if anything, did you do? A. At that point I felt I had to gain control of the situation. There was one police officer down, another police officer with his whole face covered with blood. I took my off-duty weapon out, yelled that I was a police officer again, and fired into the ground, the dirt between the sidewalk and the street. I did that to gain control of the situation, to stop it from going any further and to minimize the injuries to the other officers.

Q. How many times did you actually discharge your weapon? A. Once.

Q. And where did you discharge it? A. Into the dirt.

Q. Why did you discharge it into the dirt? A. To avoid ricochets.

Q. Did you ever discharge your weapon after that? A. No, sir.

Q. And what did you do with the weapon after you discharged it? A. Well, I looked. Most

of the people started running, but Jorda was still by Guyette kicking him. At that point, I holstered the weapon and went to where Jorda was and grabbed onto him.

Q. Tell me, why were you carrying a weapon that night if you were off-duty? A. Well, it's police department policy that I must carry a weapon while on and off-duty while I am in the City of New Brunswick.

Q. Can you tell me what kind of weapon you were carrying that evening? A. Small .25 Bower automatic, approximately this big.

Q. Could any sanctions be imposed against you if you did not carry your off-duty weapon while in the City of New Brunswick? A. Yes. I could be suspended or terminated.

Q. Why would that be? A. Well, as a police officer, if I see some kind of crime being committed, I must take action.

TRANSCRIPT DATED NOVEMBER 27, 1984

McDonough - cross

[Page 17, Lines 5-7; Page 18, Lines 9-17]

Q. Was there anything that you did that evening that constituted a violation of New Brunswick Police regulations or

procedures? A. At no time did I violate any department rules or regulations and I felt that I conducted myself as a good police officer.

Q. Did you have too much to drink? A. No, I did not.

Q. Did you feel that any of your actions were, that evening, were in any way influenced by having had three beers? A. No, sir.

[Page 24, Lines 14-16; Page 25, Line 5]

Q. Now, Officer, at the time you fired the shot, were warning shots permitted under good police practice and procedures? A. Yes.

TRANSCRIPT OF NOVEMBER 27, 1984

Samson - direct

[Page 158, line 14 to Page 159, line 1]

Q. Who is they that caught up with Ray? A. The gentlemen in the softball uniforms.

Q. What were they doing? A. He was pushed into a hedge, was being pistol whipped and kicked and punched by three gentlemen.

Q. When you say "pistol whipped," what part of his body was being struck by the

gun? A. It was his head, the left side of his head, because they were using their right hands with the pistols.

Q. Was that both men with the pistols? A. There was one person over Ray with the pistols. I didn't see who it was, but there was one person from the front and a couple people around him kicking.

APPENDIX E — NEW BRUNSWICK POLICE GENERAL ORDER NO. 7

Middlesex County Prosecutor's Office
P.O. Box 71
New Brunswick, New Jersey 08903
RICHARD S. REBECK
PROSECUTOR

February 27, 1980

Dear Chief:

Please find attached a copy of the Middlesex County Standard Operating Procedures on the use of force. As you can see, in certain ways it differs from the draft submitted to you by myself in October, 1979. Highlighting those differences, be advised that, for one, the caption, *Prevention of Crime,* has been renamed. It is now, *Effecting an Arrest.* This now appears as "B. 3." on page three of the new order. In addition, under this new caption, deadly force may be used only where there is a murder, manslaughter, kidnapping, aggravated arson, robbery, or aggravated sexual assault, the latter only under conditions set forth in the order on page four. Deleted are burglary, sexual assault, the remaining aggravated sexual assaults, aggravated sexual contact and arson. Similarly, the same was done under "B.4.", now entitled, *Escape from Custody.* Originally, this was preceeded by the word "Arrest", which has been deleted. This now appears on page five of the new order.

Particular notice should be given to the new *Escape from Detention* clause. This is a significant change from the original language. It now reads, "It is the policy of this order that where an individual escapes from detention, deadly force may only be used if it could have been used to make the arrest." Also included

in the order is a new section dealing with *Discharge of Firearms from Moving (Police) Vehicles or at Fleeing Vehicles (Perpetrator's Vehicles).* This is to be found on pages six and seven of the new order. In addition, included in the new order is a *Procedure to be Followed for the Investigation of the Discharge of a Weapon.* This will be found on pages seven and eight.

These are the use of force guidelines that are to be followed. If you wish to amend this written policy to make it even stricter than what is presented here, you must, in writing, obtain our approval.

Yours very truly,

s/ Richard S. Rebeck
RICHARD S. REBECK
Middlesex County Prosecutor

Appendix E

USE OF FORCE

INTRODUCTION

A. As a result of the enactment of the New Jersey Code of Criminal Justice, *N.J.S.* 2C: 1-1 *et seq.*, effective September 1, 1979 this order expresses the policy and serves as guidance concerning the use of force in law enforcement. This order also incorporates the essence of laws and department training concerning the use of force by officers in the performance of their duties. A police officer who is not familiar with these provisions can be liable to criminal prosecution if his acts are not exempted by the code.

B. As defined in *N.J.S.* 2C: 3-11, deadly force means force which the officer uses with the purpose of causing or which the officer knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle, building or structure in which another person is believed to be, constitutes deadly force. A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the purpose is limited to creating an apprehension that the officer will use deadly force if necessary, does not constitute deadly force. Serious bodily harm means bodily harm which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ or which results from aggravated sexual assault.

C. Non-deadly force means physical force other than deadly force.

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POLICY

A. It is the policy of this order that police officers employ force in the performance of their duties only to the degree and in the manner provided by law and consistent with the provisions of the New Jersey Code of Criminal Justice.

B. Warning shots by officers performing their duties are not authorized.

COMMENT

Officers have special legal authority to use force or deadly force in certain situations subject to limitations. Notwithstanding this authorization, they are under a duty to employ extraordinary care in the handling of firearms and other deadly weapons. It is essential that each officer exercise sound judgment and act reasonably under all circumstances where any force is applied. Given the existence of the requisite conditions, an officer should resort to force or deadly force only when immediately necessary and only after less drastic alternatives have been exhausted or are believed to be ineffective in light of the prevailing circumstances. The policy of this order is that officers shall exhaust every other reasonable means of apprehension before resorting to the use of force or deadly force.

MECHANICS

A. Use of Non-Deadly Force

1. Officers are justified in using non-deadly force in the performance of their duties when they reasonably believe it is immediately necessary to:

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a. Effect an arrest for any offense or crime under the laws of the State of New Jersey, or

b. Protect themselves or others against the use of unlawful force by another person, or

c. Thwart the commission of a crime involving or threatening bodily harm, damage to or loss of property or a breach of the peace, or

d. Prevent an escape, or

e. Prevent another from committing suicide or inflicting serious bodily harm upon oneself.

2. The use of non-deadly force to effect an arrest, however, is not justifiable unless:

a. Officers make known the purpose of the arrest or reasonably believe that their identity and purpose are otherwise known by or cannot reasonably be made known to the person to be arrested; and

b. When the arrest is made under a warrant, the warrant is valid or reasonably believed by the officer to be valid.

B. Use of Deadly Force

Officers are justified in using deadly force in the performance of their duties only in the following situations and subject to the following limitations consistent with the provisions of the New Jersey Code of Criminal Justice:

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1. Self-Defense

When officers REASONABLY believe that deadly force is necessary to protect themselves against death or serious bodily harm.

COMMENT

Officers when justified in using force, are not obliged to desist because resistance is encountered or threatened. They may not only stand their ground, but may press forward to achieve a lawful objective, overcoming force with force. Therefore, officers are not required to retreat, even if they could do so with complete safety, when force or deadly force is used against them.

2. Defense of a Third Person

When officers REASONABLY believe that their intervention is necessary to protect another against death or serious bodily harm, except that deadly force is not justifiable:

a. If the officer can otherwise secure the complete safety of the protected person; or

b. Where it REASONABLY appears to officers that the person they seek to protect has unlawfully, with the purpose of causing death or serious bodily harm, provoked the use of deadly force against himself in the same encounter.

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3. Effecting an Arrest

When the officer REASONABLY believes that:

a. Deadly force is necessary to effect an arrest for the following crimes, or an attempt to commit one of these crimes:

(1) MURDER or MANSLAUGHTER (2C:11-3) (2C:11-4)

(2) KIDNAPPING (2C:13-3)

a. This does not include Criminal Restraint (2C:13-2), False Imprisonment (2C:13-3), Interference with Custody (2C:13-4), or Criminal Coercion (2C:13-5)

(3) AGGRAVATED ARSON (2C:17-1a)

(4) ROBBERY (2C:15-1)

(5) AGGRAVATED SEXUAL ASSAULT (2C:14-2a)

Only where the victim sustains or is threatened with severe personal injury or the actor is armed with a weapon or any object fashioned in such a manner as to lead the victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object;

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AND

b. The officer REASONABLY believes

(1) There is an immediate threat of deadly force to himself or a third party; or

(2) The use of deadly force is necessary to stop a person from committing one of the crimes listed in part (a).

(3) The use of deadly force is necessary to prevent an escape from one of the crimes listed in part (a).

Remember, the policy of this order is that officers shall exhaust every other REASONABLE means of apprehension before resorting to the use of deadly force. Also, keep in mind, that in certain situations, technically, deadly force may be used but that common sense will prevail and the officer will hopefully choose not to use it. If there is any doubt in the police officer's mind whether to shoot or not shoot, the rule to follow is, DO NOT SHOOT;

AND

c. THE USE OF DEADLY FORCE PREVENTS NO SUBSTANTIAL RISK OF INJURY TO INNOCENT PERSONS.

NOTWITHSTANDING the provisions of *N.J.S.* 2C:3-7b (2) (c) and *N.J.S.* 2C:3-7e., it is the policy of this order that the use

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of deadly force, by officers is UNAUTHORIZED to prevent:

a. DEATH BY AUTO (2C:11-5), or

b. SIMPLE ARSON (2C:17-1b)

c. BURGLARY OF AN OCCUPIED DWELLING (2C:18-2)

d. 1. SEXUAL ASSAULT (2C:14-2b)

2. AGGRAVATED SEXUAL ASSAULT (2C:14-3)

3. SEXUAL CONTACT (2C:14-3)

e. AGGRAVATED SEXUAL ASSAULT other then the situations under a, (5) above, (2C:14-2a)

4. Escape from Custody

a. This section applies when an officer REASONABLY believes that deadly force is necessary to prevent an escape of a person who has committed or has attempted to commit one of the following crimes:

(1) MURDER or MANSLAUGHTER (2C:11-3) (2C:11-4)

(2) KIDNAPPING (2C:13-1)

a . This does not include Criminal Restraint

(2C:13-2), False Imprisonment (2C:13-3) Interference with Custody (2C:13-4), or Criminal Coercion (2C:13-5)

(3) AGGRAVATED ARSON (2C:17-1a)

(4) ROBBERY (2C:15-1)

(5) AGGRAVATED SEXUAL ASSAULT (2C:14-2a)

Only where the victim sustains or is threatened with severe personal injury or the actor is armed with a weapon or any object fashioned in such a manner as to lead the victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object;

AND

b. THE USE OF SUCH DEADLY FORCE CREATES NO SUBSTANTIAL RISK OF INJURY TO INNOCENT PERSONS.

COMMENT

The use of deadly force to prevent the escape of an arrest person from custody is justifiable if deadly force could have been employed to effect the arrest under which the person is in custody. If only non-deadly force could have been used to make an arrest in the first place, only non-deadly force

could be used to prevent the escape. Remember, the policy of this order is that officers shall exhaust every other REASONABLE means of apprehension before resorting to the use of deadly force. Also keep in mind, that in certain situations, technically, deadly force may be used but that common sense will prevail and the officer will hopefully choose not to use it. If there is any doubt in the police officer's mind whether to shoot or not shoot, the rule to follow is, DO NOT SHOOT.

NOTWITHSTANDING the provisions of *N.J.S.* 2C:3-7b (2) (c) and the foregoing, it is the policy of this order that the use of deadly force by officers is UNAUTHORIZED to prevent an escape from custody for the crimes or attempts to commit the crimes of:

a. DEATH BY AUTO (2C:11-5), or

b. SIMPLE ARSON (2C:17-1b)

c. BURGLARY OF AN OCCUPIED DWELLING (2C:18-2)

d. 1. SEXUAL ASSAULT (2C:14-2b)

2. AGGRAVATED SEXUAL CONTACT (2C:14-3)

3. SEXUAL CONTACT (2C:14-3)

e. AGGRAVATED SEXUAL ASSAULT other than the situations under a, (5) above, (2C:14-2a)

5. Escape from Detention

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It is the policy of this order that where an individual escapes from detention, deadly force may only be used if it could have been used to make the arrest.

C. Discharge of Firearms from Moving (Police Vehicles) Vehicles or at Fleeing Vehicles (Perpetrator's Vehicles).

1. Firearms are not to be discharged at fleeing vehicles except as follows:

a. When it becomes ABSOLUTELY necessary to protect the officer or other persons from death or serious bodily harm. It applies where a SUBSTANTIAL risk exists that the person sought will cause death or serious bodily harm if his apprehension is delayed.

b. The safety of innocent bystanders is to be a PRIMARY factor considered by a police officer in his determination to discharge a firearm at a moving vehicle; and the following series of factors must be weighed first; ricochets, danger of car out of control, and the safety of any person.

c. When a suspect is fleeing from the scene of a crime in a moving vehicle, it is best to attempt to apprehend the subject through the use of police communications media and cooperative police work rather than by shooting at the vehicle. *Except in the most extreme cases, shots fired at a moving vehicle are not authorized.*

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2. Under NO circumstances are shots to be fired from a moving vehicle.

D. Overlapping Justifications

There will be situations where the justifications overlap. The fact that the use of deadly force may not be warranted under a particular justification, (*e.g.:* to effect an arrest or to prevent an escape of disorderly persons offender, etc.) does not mean that an officer who is lawfully effecting the arrest of a disorderly persons offender cannot use deadly force in self-defense.

E. Procedure for Investigation of Discharge of a Weapon

1. Each law enforcement agency in Middlesex County shall maintain a specially designated unit to investigate ALL instances of the discharge of a weapon by a law enforcement officer except for weapons discharged at an approved firing range.

   The name of the officer designated to command the investigative unit shall be provided to the Prosecutor's Office by the Chief of Police of every department in Middlesex County.

2. In all instances of the discharge of a weapon as specified in paragraph (1) the following investigative and administrative procedures shall be followed:

   a. Officers are required to report to their superior IMMEDIATELY all instances involving discharges of their weapons except those fired in the course of training.

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b. Notice shall be given to the Chief of Police and Prosecutor's Office within 24 hours of the discharge of a weapon unless the weapon was discharged in destroying an animal in which case no such notice is required to be sent to the Prosecutor's Office.

c. The investigative unit will submit all investigative reports to the Chief of Police with copies to the Prosecutor's Office.

d. Each department shall maintain a log, by name of officer, of all uses relating to discharge of weapons.

THIS ORDER APPLIES TO SWORN MEMBERS WHILE ON DUTY, AS WELL AS SWORN MEMBERS OFF DUTY.

No. 87-2120

In The

Supreme Court of the United States

OCTOBER TERM, 1987

RAYMOND JORDA,

Petitioner,

-vs-

CITY OF NEW BRUNSWICK, and
NEW BRUNSWICK POLICE DEPARTMENT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Superior Court of New Jersey, Appellate Division denied a New Jersey citizen due process by utilizing a more stringent burden of proof than that set forth by this Court to establish a 42 U.S.C. Section 1983 claim against a municipality?

2. Whether a municipality's policies and/or customs which are manifest in negligent training, supervision and monitoring of its police officers and which lead to constitutional deprivations can establish municipal liability under 42 U.S.C. Section 1983?

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STATEMENT OF THE CASE

The Respondents, City of New Brunswick and City of New Brunswick Police Department, will accept the Statement of Facts as prepared by the Petitioner, Raymond Jorda, except to deny the assertion on Page 4 that a de facto policy existed in the New Brunswick Police Department fostering the use of violence and excessive force.

REASONS FOR DENYING THE WRIT

THE TRIAL COURT PROPERLY REFUSED TO ALLOW THE LACK OF COMPLAINTS AGAINST NEW BRUNSWICK POLICE OFFICERS TO BE USED AS SUBSTANTIVE EVIDENCE OF A POLICY NOT TO DISCIPLINE OFFICERS FOR ACTS OF VIOLENCE, AND THE TRIAL COURT PROPERLY GRANTED A DIRECTED VERDICT AGAINST THE DEFENDANT-THIRD PARTY PLAINTIFF AT THE END OF ALL THE EVIDENCE.

There was no statement, ordinance, regulation or decision officially adopted by the City of New Brunswick or Police Department of the City of New Brunswick that would lead to liability under Monell v. Department of Social Services, 436 U.S. 658; 98 S. Ct. 2018, 56 L.Ed. 2d 611 (1978). There was no official regulation or custom, and plaintiff's attempt to introduce the lack or absence of a record of complaints does not amount to an official policy of Civil Rights violations.

There was no evidence that the actions of Police Officers, McDonough and Grey, were part of an official policy of the City of

New Brunswick or City of New Brunswick Police Department to tolerate excessive violence. The evidence that was adduced only supported an argument that the actions of the officers were intentional and beyond proper police conduct and contrary to the training and policies of the Department. By the plaintiff's failure to offer any evidence that the type of conduct exhibited by McDonough and Grey was condoned by the City or Police Department, plaintiff failed to substantiate the policy which was a requisite of his proofs under Means v. City of Chicago, 535 F. Supp. 455 (E.D. Ill. 1982).

Plaintiff's argument that the trial court's decision to dismiss the case against the City and Police Department was error because plaintiff was barred from introducing evidence of a policy of civil rights is unfounded. It was clearly proper

for the trial court to prohibit the introduction of testimony concerning the lack of complaints when such testimony was to be offered as substantive evidence of a policy of civil rights violations. Since the testimony was properly barred, the dismissal of the entire case properly followed.

Plaintiff by-passes the fact that the officers involved had never been convicted of any criminal act and that there was no evidence of any prior civil actions similar in nature to this against the same officers.

Accordingly, there is no basis for an argument or allegation that evidence of prior similar acts on the part of other police officers existed. The fact that the City or Police Department does not maintain records of complaints filed against police officers, does not amount to evidence at all, let alone evidence of a policy of

tolerance of civil rights deprivations required under Delgado v. City of Newark, 165 N.J. Super. 477 (L. Div. 1979).

There was absolutely no basis to permit the trier of fact to decide that discipline was not enforced in the Police Department, because there was no evidence pointing to that conclusion upon which reasonable minds could differ. The plaintiff failed to meet the necessary burden established by Popow v. City of Margate, 476 F. Supp. 1237 (D.C.N.J. 1979). The only proofs that were properly before the Court demonstrated that the police officers in the City of New Brunswick were afforded their basic constitutional rights of equal protection of the laws and due process. No records are kept in the City of New Brunswick Police Department if a police officer is not convicted or if personnel action is not necessary. It would be a violation of the civil rights of a police officer to maintain records of allegations that are determined to be

unfounded and without merit. Only the lack of corrective action in the face of a stream of Police Department convictions for excessive use of force could be termed of any relevance! A complaint that does not result in a conviction cannot be a basis for reprimand by the City of New Brunswick Police Department or City of New Brunswick, or a black mark to remain in an officer's personnel file.

Any allegations of negligence against the City of New Brunswick arising out of the conduct of Officers McDonough and Grey were not sustainable as a matter of law. There was clearly no evidence that the intentional conduct of these officers was condoned by a policy of the City. Thus, there was no fact question to be decided by the jury concerning the liability of the City.

The decision of the trial court to exclude introduction of General Order No. 7 of the New Brunswick Police Department into evidence was not error. It would have been

error to have allowed counsel for plaintiff to argue that this Rule was admissible as substantive evidence to prove that the City of New Brunswick was in violation of the plaintiff's civil rights. It is incongruous to argue that an officer's lack of familiarity with the Rule of the Department intended to protect the public demonstrates a Department policy to ignore such rules, and that violation of Police Department Rules was considered to be good police practice!

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the Superior Court of New Jersey, Appellate Division, should be denied.

Respectfully submitted,

RICHARD A. AMDUR, P.C.
Attorney for Respondents

RICHARD A. AMDUR, ESQ.
Of Counsel

RICHARD A. AMDUR, ESQ.
On the Brief